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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF NEW YORK,

Petitioner,

– against –

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

In Federal Tort Claims Act litigation where the United States of America has waived its sovereign immunity, does the eleventh amendment bar the federal government's third-party claim for contribution against the State of New York?

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OPINIONS AND ORDERS

The August 2, 1988 opinion of the United States Court of Appeals for the Second Circuit, affirming the denial by the United States District Court for the Southern District of New York of petitioner's motion to dismiss respondent's third-party complaint, is reported at 853 F.2d 124. It is reproduced as Appendix A to this petition.

The district court entered an order on July 1, 1987, with opinion to follow, which denied petitioner's motion. The order is not reported and is reproduced as Appendix B to this petition. On September 8, 1987, the district court issued the opinion, promised by its earlier order. The opinion is reported at 668 F. Supp. 339 and is reproduced as Appendix C to this petition.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on August 2, 1988. It is reproduced as Appendix D to this petition.

This Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C. § 1254(1) (1982).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article III, section 2, clause 1 of the United States Constitution provides:

> The judicial power shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all cases affecting Ambassadors, other public ministers and Consuls; — to all cases of admiralty and maritime Jurisdiction; — to controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States; between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

28 U.S.C. § 1346(b)(1982) provides:

> Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. § 2674 (1982) provides:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.
>
> If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

STATEMENT OF THE CASE

A. *Proceedings in the District Court*

Twelve years ago, plaintiff, Elizabeth Barrett ("Barrett"), sued respondent, the United States of America and petitioner, the State of New York, among others, for the wrongful death of her father, Harold Blauer ("Blauer"), in the United States District Court for the Southern District of New York (*Pierce*, J.). He died in 1953 as the result of the injection of an experimental drug supplied by the United States and administered by doctors employed by New York.

The district court granted New York's motion to dismiss shortly after the commencement of the litigation on the ground that the Eleventh Amendment to the United States Constitution barred Barrett's claim against the state. Endorsement Order, dated May 21, 1976. Four months earlier, the New York Court of Claims (the "Court of Claims") ruled that Barrett could plead no cause of action against New York given a 1955 judgment which Blauer's estate had earlier secured against the state for Blauer's wrongful death. *Barrett v. State of New York*, 85 Misc. 2d 456, 378 N.Y.S.2d 946 (Ct. Cl. 1976).

While Barrett could not sue New York in either the federal or state courts, her action against the United States was cognizable in the district court. The United States had waived its immunity from suit for the torts of its employees by the enactment of the Federal Tort Claims Act (the "FTCA"), 28 U.S.C. §§ 1346(b) and 2671-2680 (1982). With limited exception, the federal government's liability was to be determined just like that of a "private person", *id.* at § 1346(b), or a "private individual", *id.* at § 2674, "under like circumstances. . . ." *Id.*[1] Accordingly, it remained a defendant in the district court together with the private party defendants whom Barrett also had sued.

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[1] We refer to these statutory provisions hereinafter, at times, as the "private individual" language of the FTCA.

Ultimately, Barrett prevailed against the United States. *Barrett v. United States*, 660 F. Supp. 1291 (S.D.N.Y. 1987). The district court (*Motley*, J.) entered judgment in the amount of $702,044 for Blauer's wrongful death. Judgment No. 87,1067, entered June 4, 1987.

On the eve of trial and ten years after New York had been dismissed as a defendant in Barrett's action, the United States moved to implead the state for the purpose of obtaining either contribution or indemnification. *See* Notice Of United States' Motion For Leave To File Third-Party Complaint, dated May 5, 1986. The district court granted the United States' motion, but it severed the third-party action from the "trial of the main action. . . [i]n the interest of justice. . . ." Order, dated June 27, 1986.

After its joinder, New York moved to dismiss the United States' third-party complaint based, in part, upon the defense of its sovereign immunity. Memorandum Of Law In Support Of The State Of New York's Motion To Dismiss The Third-Party Action (the "N.Y. memo") at 25. It relied upon the private individual language of the FTCA, construed in *United States v. Yellow Cab Co.*, 340 U.S. 543 (1951), for the proposition that the United States' position in FTCA litigation was the same as that of a private party. N.Y. memo at 25. Since the eleventh amendment foreclosed a private individual's suit for contribution against New York in federal court, the state argued that the constitutional proscription similarly barred the United States' claim against it in federal court. *Id.* at 26.

After finding against the United States in the main action, the district court turned to the United States' third-party action against New York. The court first rejected the United States' indemnity claim on the ground that the United States had been held liable for only its negligence, not the purported negligence of the state. App. C at 2c.[2]

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[2] References preceded by "App." identify the lettered appendices to this petition.

However, the district court rejected the state's sovereign immunity defense to the United States' claim for contribution. *Id.* at 5-6. The court said *Yellow Cab* did not control because this Court there considered the United States' status as a third-party defendant in FTCA litigation in contrast to its third-party plaintiff position here. *Id.* at 6. Ignoring that New York had waived its immunity from suit only in its Court of Claims, the court also distinguished *Hill v. United States*, 453 F.2d 839 (6th Cir. 1972), and *Horton v. United States*, 622 F.2d 80 (4th Cir. 1980), upon which the state had relied. According to the court, New York permitted suit against it, unlike "the states in question" in *Hill* and *Horton*, which "had not waived their immunity from suit." *Id.* at 5. Last, the district court expressed its agreement with *Parks v. United States*, 784 F.2d 20 (1st Cir. 1986); *United States v. Illinois*, 454 F.2d 297 (7th Cir. 1971), *cert. denied*, 406 U.S. 918 (1972); and *United States v. California*, 328 F.2d 729 (9th Cir.), *cert. denied*, 379 U.S. 817 (1964), which the court characterized as contribution cases, each holding "that the Eleventh Amendment does not bar the United States from impleading a state." App. C at 6c.

B. *Proceedings in the Court of Appeals*

New York then appealed to the United States Court of Appeals for the Second Circuit pursuant to 28 U.S.C. § 1291 (1982). The state invoked the court of appeals' jurisdiction under *Minotti v. Lesink*, 798 F.2d 607, 608 (2d Cir. 1986), *cert. denied*, 107 S.Ct. 2484 (1987), which holds that the denial of a defense predicated upon the eleventh amendment is appealable under the collateral order doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), and its progeny. New York argued that: (1) the district court's opinion conflicted with *Hill*, 453 F.2d at 839, and *Horton*, 622 F.2d at 80; and (2) Congress did not intend to abrogate the states' immunity when it enacted the FTCA; or (3) alternatively, such an abrogation would raise a fundamental constitutional question of the extent of Congress' power. Brief of Third-party Defendant-appellant, the State of New York (the "N.Y. br.") at 22-23.

The court of appeals (*Timbers*, *Kearse*, and *Mahoney*, JJ.) affirmed the district court's denial of New York's motion. App. A at 6a. The court held "that where New York has waived sovereign immunity from liability for contribution, thus providing the United States with a valid claim under state law, neither the eleventh amendment nor any state law bars federal jurisdiction with respect to such a claim by the United States." *Id.* at 13a-14a.

The court first cited general principles of eleventh amendment jurisprudence. *Id.* at 6a. However, it said that these principles did not apply under *United States v. Texas*, 143 U.S. 621 (1892), and its progeny, such as *California*, 328 F.2d at 729 and *Illinois*, 454 F.2d at 297. *See* App. A at 6a-7a. Instead, it noted its agreement with, and followed, *United States v. Hawaii*, 832 F.2d 1116 (9th Cir. 1987). App. A at 10a. There, the ninth circuit, relying upon *Texas*, permitted the United States to prosecute a contribution claim against Hawaii in federal court because the court said the claim did not derive from the underlying claim of the private party plaintiff. *Hawaii*, 832 F.2d at 1117. The court of appeals further saw no conflict with *Hill* and *Horton* because "[b]oth cases. . .were decided on the basis that the relevant state substantive law. . .did not provide a basis for recovery. . .", *id.* at 10a, and neither case mentions the eleventh amendment. *Id.* at 11a.

The court of appeals regarded *Illinois*, 454 F.2d at 297, where the seventh circuit approved of the United States' third-party claim for indemnification, as instructive. *See* App. A at 4a. Although the court recognized that "[a] claim for contribution differs from a claim for indemnity. . .", *id.* at 8a & n.3, it remained unpersuaded that "the distinctions" urged by New York were significant in its analysis of the issue before it. *Id.* at 10a. Noting that the first circuit in *Parks*, 784 F.2d at 25, apparently had perceived the conceptional distinction between such claims as significant, the court read *Parks* as limited to its maritime context. App. A at 11a-12a.

Unlike the district court which had completely failed to recognize that New York limited its waiver of immunity to a

special forum (App. C at 5c), the court of appeals did observe that "[i]t is also clear under New York law that an action for contribution against the state as a joint tortfeasor may only be maintained in the New York Court of Claims." App. A at 13a. Additionally, the court recognized that the FTCA makes the United States a private party defendant except in some limited circumstances. *Id.* at 15a. However, it refused to "read the FTCA as limiting or abrogating either the power of the United States that is implicit in our federal system to maintain, or the jurisdiction of the federal courts that is vested by Article III of the federal constitution to hear and decide, an action against a state in federal court." *Id.*

REASONS FOR GRANTING THE WRIT

Nearly a century ago in *United States v. Texas*, 143 U.S. 621 (1892), this Court decided that the Eleventh Amendment to the United States Constitution did not restrict the Article III jurisdiction of federal courts to entertain a suit by the United States against a state. However, this Court has never decided whether the principle of *Texas* extends to the modern circumstance where the United States, having waived its sovereign immunity, seeks contribution from a state as a private individual, its status under the FTCA. Following the ninth circuit, the court of appeals here has determined that *Texas* should be extended to cover this situation. The fourth circuit, following the sixth circuit, has concluded just the opposite. Resolution of the conflict between the courts of appeals is important because the issue involved arises frequently and disturbs the relationship between the federal government and the states.

Additionally, the court of appeals' construction of the FTCA permits the United States, which has waived its sovereign immunity and which stands in the shoes of a private individual under the federal statute, to enjoy a better status than a private party who seeks to sue or to implead a state. Having improperly elevated the United States under the FTCA to a sovereign capacity, the court's opinion undermines established eleventh amendment jurisprudence. Its reading of the FTCA perforce

raises a "serious constitutional question", *United States v. Arizona*, 214 F.2d 389, 394 (9th Cir. 1954), of whether Congress has the authority to abrogate the states' immunity "[j]ust because" the federal government has waived its protection from suit for its own purposes.

A. *A Conflict Exists between the Second and the Ninth Circuits Which Hold that the United States May Always Sue a State in Federal Court and the Sixth and Fourth Circuits Which Recognize a Limitation of this Right When the United States Sues for Contribution in a FTCA action.*

Article III, section 2, clause 1 of the United States Constitution provides that federal courts have jurisdiction to entertain controversies involving the United States and states. The Court has held that the eleventh amendment does not restrict this jurisdictional predicate because the states impliedly consented to the paramount sovereignty of the federal government when they entered into the constitutional compact. *Texas*, 143 U.S. at 646.

Yet, the Constitution's writers, two hundred years ago, and this Court, when it later considered the relationship between Article III and the eleventh amendment in *Texas*, never contemplated that the federal government would one day seek contribution from a state as a joint tortfeasor. *Hans v. Louisiana*, 134 U.S. 1, 15 (1890). Without doubt, the United States' sovereign immunity then barred tort actions against it, *id.*, and the common law did not recognize a claim for contribution. *See, e.g., Merryweather v. Nixan*, 101 Eng. Rep. (K.B. 1799); *Restatement (Second) of Torts* § 886A comment a (1979).

Congress' determination to treat the United States as a private party when it waived the federal government's immunity for the torts of its agents, 28 U.S.C. § 1346(b), requires that *Texas* be observed in its historical context. Both the sixth circuit and the fourth circuit properly understood that the principle of *Texas*

does not "confer any right of action" upon the United States for contribution. *Hill v. United States*, 453 F.2d 839, 843 (6th Cir. 1972); *accord Horton v. United States*, 622 F.2d 80, 82 (4th Cir. 1980). In such a case, the federal government merely stands in the shoes of a private party because contribution "is derivative in nature, with its legitimacy dependent upon the injured party's ability to maintain a direct action against the third-party defendant." *Id.* Thus, a state's sovereign immunity, constitutionally codified in the eleventh amendment, bars the United States' contribution claim, as it likewise precludes the injured party's direct action against the state unless the United States complies with the terms of the state's limited waiver of immunity. *See Hill*, 453 F.2d at 842-43.

The court of appeals here and the ninth circuit in *United States v. Hawaii*, 832 F.2d 1116 (9th Cir. 1987), wrongly held just the opposite. The courts found that the United States' contribution claim is independent of the injured party's "underlying claims." *Hawaii*, 832 F.2d at 1117; App. A at 10a.[3] Their misunderstanding of the nature of contribution erroneously led them to conclude that under *Texas* and its progeny the eleventh amendment does not bar the United States' claim in federal court. *Id. See United States v. Minnesota*, 270 U.S. 181, 193-95 (1925) (if the United States is not the real party in interest, the eleventh amendment restricts this Court's Article III jurisdiction to entertain an action by the United States against a state);

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[3] Commentators universally agree that a contribution claim depends upon whether the injured party has a cause of action against the third-party defendant and that an immunity enjoyed by a third-party defendant will bar such a claim. *See generally Restatement (Second) of Torts*, *supra* p. 9, at comment g; Harper, James & Gray, 3 *The Law of Torts* § 10.2 at 46-47 (2d ed. 1986); Lee & Lindahl, 1 *Modern Tort Law* § 20.20 at 707 (Rev. ed. 1988). *Accord Zaccari v. United States*, 130 F. Supp. 50, 51-52 (D. Maryland 1955) and *Holodook v. Spencer*, 36 N.Y. 2d 35, 51, 364 N.Y.S.2d 859, 872, 324 N.E.2d 338, 346 (1974) (both holding that intra-family immunity preventing direct action by injured party similarly precluded third-party claim by tortfeasor against immunized party); *cf. Stencel Aero Eng. Corp. v. United States*, 431 U.S. 666 (1977) (contribution claim brought by joint tortfeasors against United States pursuant to FTCA denied because victim ineligible to sue the federal government).

cf. Hawaii v. Standard Oil Co., 405 U.S. 251, 258 & n.12 (1972) (reciting authority holding that the eleventh amendment restricts this Court's Article III jurisdiction to entertain suits between states when a state sues, not as a sovereign, but as the stalking horse for a private party.)

Further, the court of appeals failed in its effort to harmonize its ruling with *Hill* and *Horton* on the ground that these were not eleventh amendment cases. *See* App. A at 10a-12a. *Hill*, followed in *Horton*, specifically addressed and rejected the United States' argument that the federal government should be permitted to implead Tennessee because *Texas* would allow it to bring an independent action for contribution against the state. *Hill*, 453 F.2d at 842. Contrary then to the court of appeals here (App. A at 11a), the sixth circuit did consider the relationship between the eleventh amendment and Article III when it held that *Texas* did not permit the United States' third-party claim even if *Hill* made no explicit "mention", *id.*, of the constitutional proscription.

Last, the court of appeals did not achieve doctrinal consistency when it found *Hill* and *Horton* to be inapposite because New York supposedly, unlike Tennessee and South Carolina, "has waived its immunity from suit in tort." App. A at 12a. Following the court's logic, the distinction should then have been observed in *United States v. Illinois*, 454 F.2d 297 (7th Cir. 1971), *cert. denied*, 406 U.S. 918 (1972), because that state, like Tennessee and South Carolina, also had not waived its immunity. Yet, the seventh circuit in *Illinois*, upon which the court of appeals relied, failed to draw any such distinction. While the court of appeals, tellingly, acknowledged that *Illinois* "seems at odds with *Horton* and *Hill* on this point" (App. A at 10a & n. 5), it failed to observe that its opinion also conflicted with the decisions of the fourth and sixth circuits. [4] The court, like the

[4] The seventh circuit characterized *Illinois* as an indemnification action by the United States. *Illinois*, 454 F.2d at 298. Accordingly, the decision does not directly conflict with *Hill* and *Horton* which concern contribution claims.

(Footnote continued)

seventh circuit, merely incanted that *Texas* always applies. *Compare Illinois*, 454 F.2d at 301 *with* App. A at 6a, 14a. As demonstrated above, *Hill* and *Horton* are to the contrary. They recognize that a state's sovereign immunity must be respected when considering a contribution claim by the United States against a state. *Contrast Lee v. Brooks*, 315 F. Supp. 720 (D. Hawaii 1970) (eleventh amendment barred a contribution claim by a private third-party plaintiff against Hawaii, but *Texas* permitted United States' identical claim).

B. *The Court of Appeals' Reading of the FTCA Raises Serious Constitutional Questions of Whether Congress Intended to Abrogate the States' Immunity When It Waived the United States' Immunity and Whether It Had The Power To Do So If That Were Its Intention.*

The court of appeals wrongly read the FTCA as abrogating the states' immunity. *Contrast* App. A at 15a. Its misreading of the "private individual" language of this federal statute caused it to ignore basic principles of eleventh amendment law. The court's opinion raises a "serious constitutional question", *United States v. Arizona*, 214 F.2d 389, 394 (9th Cir. 1954), of Congress' power to abrogate the states' immunity.

Claims for contribution and for indemnity differ. Contribution depends first upon the right of an injured party. *Horton*, 622 F.2d at 83. On the other hand, a right to indemnification belongs to the joint tortfeasor, independent of any right enjoyed by the injured party. *Putvin v. Buffalo Electric Co.*, 5 N.Y.2d 447, 455, 186 N.Y.S.2d 15, 21 (1951). Unlike contribution which emanates from equity, "[i]ndemnity . . . springs from contract, express or implied." Gottlieb, *Some Aspects of Contribution and Indemnity in Tort Actions Against the United States*, 9 FED. B.J. 391, 408 (1948) [hereinafter cited as "*Gottlieb*"].

Accordingly, *Texas* may be read to permit the United States to enforce an indemnification, as opposed to, a contribution claim. *See Parks v. United States*, 784 F.2d 20, 25 (1st Cir. 1986) (holding that the United States' right to obtain indemnity was established, but regarding the United States' right to seek contribution as an "open question" given the bar of the eleventh amendment).

1. *The FTCA places the United States in the shoes of a private party when it seeks contribution*

When Congress adopted the private individual language of the FTCA, it intended the federal government's liability to be determined by local substantive law. *United States v. Yellow Cab Co.*, 340 U.S. 543, 551 & n.8 (1951) (citing legislative history). In *Yellow Cab*, the Court interpreted this statutory language in the context of a third-party action seeking contribution from the United States. The Court held that the United States could either be sued for contribution in an independent action, *id.* at 552, or could be impleaded for the same purpose, *id.* at 557, because it, otherwise, would be in a better position than a private party. *Id.* at 552.

A study of the legislative history of the FTCA compels an identical result when the United States seeks contribution since Congress also intended the federal government's "*rights*. . . involving joint tort-feasors", *id.* at 551 & n.8, to be no better than a private party's. (Emphasis added.) *See Gottlieb*, *supra*, p. 12 & n. 4, at 405-06; *The Federal Tort Claims Act*, 56 Yale L.J. 534, 553 & n.125 (1947); and Gottlieb, *The Federal Tort Claims Act-A Statutory Interpretation*, 35 Geo. L.J. 1, 28-29 (1946) [hereinafter cited as "Geo.L.J."]. As this Court noted in *Yellow Cab*, 340 U.S. at 543, the FTCA, enacted in 1946, was the product of "20 years of consideration" by Congress, *id.* at 549, which had considered "[m]any bills. . . ." *Id.* at 550 & n.6. Two of these earlier bills had included a provision requiring third parties, including states, to pay "damages. . . jointly with the United States. . . ." S. 2690, 76 Cong., 1st Sess. § 306 (1940). *Accord* H.R. 5373, 77th Cong., 2d Sess. § 306 (1942). However, Congress thereafter excluded states from this proportionate liability provision. *See* S. 2221, 77th Cong., 2d Sess. § 403 (1942); H.R. 6463, 77th Cong., 2d Sess. § 403 (1942). It later decided to eliminate the provision entirely. H.R. REP. No. 2245, 77th Cong., 2d Sess. 12 (1942).[5]

[5] A detailed history of this proportionate liability provision is set forth in *Gottlieb*, *supra* p. 12 & n. 4, at n. 14.

Thus, no question exists as to Congress' meaning. *See Yellow Cab*, 340 U.S. at 551 & n.8 (citing to this legislative history). It afforded the United States the same rights as any private party whose contribution claim was to be determined by the state's substantive law. *Id.* at 552. *See Gottlieb*, *supra* p. 13; *The Federal Tort Claims Act*, *supra* p. 13; and Geo L.J., *supra* p. 13.

The court of appeals failed to observe Congress' intent when it held that the United States, unlike any private party, could sue New York for contribution in federal court. New York's substantive law of sovereign immunity only recognizes the existence of a claim for contribution against the state if the claim is pleaded in the state's Court of Claims. *Bay Ridge Air Rights, Inc. v. New York*, 44 N.Y.2d 49, 54, 414 N.Y.S.2d 73, 75, 375 N.E.2d 29, 30 (1978). Thus, the court erred in providing the United States with just the better position which this Court, interpreting the private individual language of the FTCA, had said it could not enjoy as a joint tortfeasor in *Yellow Cab*.

2. *Because the United States is to be treated as a private party when it seeks contribution in a FTCA action, the eleventh amendment forecloses its suit against New York in federal court*

The court of appeals' misunderstanding of the United States' position when it sues for contribution (*ante* at 10) and its misreading of the "private individual" language of the FTCA (*id.* at 12-14) caused it to misapply basic principles of eleventh amendment law. While the court quoted *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984), for the proposition that a state's waiver of immunity was inextricably linked to a particular forum (App. A at 12a) and while it cited *Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985), for the rule that a state did not waive its immunity from suit in the federal courts by waiving its immunity in its own court (App. A at 13a), it wrongly concluded that this precedent did not govern when the United States sued a state. App. A at 14a. The court of appeals' decision depended solely upon cases which, in turn, relied upon *Texas*, 143 U.S. at 62. *See* App. A at 14a.

However, the rule of *Texas* does not extend to the circumstance here because the United States has waived its immunity and seeks contribution as a private party whose claim, in turn, depends upon the original plaintiff's right against New York. Accordingly, this Court's eleventh amendment jurisprudence, cited by the court of appeals as stating the general rule (App. A at 12a-13a), bars the United States' contribution claim against the state.[6]

By refusing to read the FTCA as urged by New York (App. A at 14a), the court of appeals necessarily held that Congress intended to abrogate the states' immunity when it enacted the FTCA. *See United States v. Arizona*, 214 F.2d 389, 393 (9th Cir. 1954). The holding raises "a serious constitutional question," *id.* at 394, of whether Congress has such authority when it acts pursuant to its Article I power "to pay the Debts."[7] The court of appeals made no effort to resolve this question although it was specifically raised by New York. *See* N.Y. br. at 23. Instead, the court avoided the issue by simply commenting that the presence of the constitutional issue, stated by the ninth circuit in *Arizona*, "must be considered to have been superceded . . . by *United States v. Hawaii*, 832 F.2d 1116 (9th Cir. 1987)." App. A at 12a. It failed

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[6] The court of appeals' ruling was based not only upon the jurisdictional predicate of Article III, considered in *Texas*, but also upon 28 U.S.C. § 1345 (1982). *See* App. A at 14a. However, the section merely extends to the lower federal courts the power vested in this Court by Article III. *United States v. California*, 328 F.2d 729 (9th Cir.), *cert. denied*, 379 U.S. 817 (1964). Since this Court lacks Article III jurisdiction to entertain the controversy, the section similarly cannot serve as a jurisdictional predicate for district courts.

[7] Article I, section 8, clause 1 of the United States Constitution provides that "Congress shall have Power . . . to pay the Debts . . . ." Congress enacted the FTCA under this provision. *See* Hearings on H.R. 5373 and H.R. 6463 before House Comm. on the Judiciary, 77th Cong., 2d Sess. 19 (1942) (colloquy between Representative Fadjo Cravens and Assistant Attorney General Francis M. Shea).

to note that the ninth circuit believed that Hawaii had conceded the eleventh amendment issue and that the ninth circuit did not even mention *Arizona*. *See Hawaii*, 832 F.2d at 1117.[8]

[8] The court of appeals similarly gave short shrift to the first circuit's view that it was an "open question" as to whether the United States could obtain contribution from a state. *Parks*, 784 F.2d at 25. *See* App. A at 11a. According to the court, "*Parks*, however, dealt with a specific rule relating to contribution in maritime cases . . . and was addressed to the impact of the eleventh amendment upon liability for contribution only in that context." *Id.* at 11a-12a.

However, the court never explained the significance of the distinction which it drew between maritime and common law torts. Indeed, the federal government's earlier waiver of immunity for its maritime torts was cited in support of the enactment of the FTCA. *See* Hearing on S. 2690 Before the Subcomm. of the Senate Comm. on the Judiciary, 76th Cong., 3d Sess. 7 (1940) (article by Alexander Holtzoff, Special Assistant to United States Attorney General, submitted for the record); *Howey v. Yellow Cab Co.*, 181 F.2d 967, 972 (3d Cir. 1950), *aff'd sub nom., United States v. Yellow Cab Co.*, 340 U.S. 543 (1951).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: New York, New York
October 31, 1988

Respectfully submitted,

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APPENDIX A

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 707—August Term, 1987

(Argued: February 19, 1988 Decided: August 2, 1988)

Docket No. 87-6189

ELIZABETH BARRETT, individually and as administratrix of the Estate of Harold Blauer, deceased,

Plaintiff,

—v.—

UNITED STATES OF AMERICA,

Defendant.

UNITED STATES OF AMERICA,

Third-party Plaintiff-Appellee,

—v.—

STATE OF NEW YORK,

Third-party Defendant-Appellant.

Before:

TIMBERS, KEARSE and MAHONEY,
Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, Constance Baker Motley, *Judge*, denying the State of New York's motion to dismiss the third-party complaint of the United States of America on the ground of eleventh amendment immunity from suit in federal court. The United States, as defendant in a Federal Tort Claims Act suit commenced by a private citizen, impleaded the State of New York as a third-party defendant on a claim for contribution. The decision of the district court with respect to the appealable issue of eleventh amendment immunity is affirmed; the exercise of pendent appellate jurisdiction with respect to other issues is declined.

BARRIE L. GOLDSTEIN, Assistant Attorney General of the State of New York, New York, New York (Robert Abrams, Attorney General of the State of New York, O. Peter Sherwood, Solicitor General, Harvey Golubock, Deputy First Assistant Attorney General, New York, New York, of counsel), *for Appellant.*

BETH A. KASWAN, Assistant United States Attorney for the Southern District of New

York, New York, New York (Rudolph W. Giuliani, United States Attorney for the Southern District of New York, Richard W. Mark, Assistant United States Attorney, New York, New York, of counsel), *for Appellee.*

MAHONEY, *Circuit Judge*:

The State of New York appeals from an order of the United States District Court for the Southern District of New York, Constance Baker Motley, *Judge*, denying its motion to vacate a prior order of that court permitting impleader or, in the alternative, to dismiss the third-party complaint of the United States against New York for contribution in a Federal Tort Claims Act suit brought by plaintiff Elizabeth Barrett against the United States. The district court denied New York's motion on the ground, inter alia, that the eleventh amendment did not bar jurisdiction of a third-party action for contribution by the United States against New York in federal court.

On October 6, 1987, the United States moved to dismiss this interlocutory appeal on the ground that the eleventh amendment claim was frivolous. A different panel of this court denied that motion. We have appellate jurisdiction of this interlocutory appeal under 28 U.S.C. § 1291 (1982) because the district court's denial of New York's motion on eleventh amendment immunity grounds constituted a reviewable collateral order. *Minotti v. Lensink*, 798 F.2d 607, 608 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 2484 (1987). *But see Libby v. Marshall*, 833 F.2d 402, 405 (1st Cir. 1987) (rejecting *Minotti v. Lensink*).

Background

The facts concerning this litigation are set out in greater detail in previous opinions of this court, *see Barrett v. United States*, 798 F.2d 565 (2d Cir. 1986); *Barrett v. United States*, 689 F.2d 324 (2d Cir. 1982), *cert. denied*, 462 U.S. 1131 (1983), and of the United States District Court for the Southern District of New York (summarized in *Barrett v. United States*, 660 F. Supp. 1291, 1295 n.2 (S.D.N.Y. 1987)). They will not be repeated here, except as necessary to frame the issues now before this court.

Elizabeth Barrett is the administratrix of the estate of her father, Harold Blauer, who died in 1953 when the New York State Psychiatric Institute administered a drug to him in the course of a chemical warfare experiment which it was conducting in cooperation with the United States Army. Blauer had no knowledge of, and therefore did not consent to participate in, this experiment. Nor were these facts disclosed to Barrett when Blauer's estate initially reached a settlement in 1955 with New York State and the (unidentified) supplier of the drug administered to him in the amount of $18,000. This settlement was ratified by the New York Court of Claims, as required by New York law. The United States paid $9,000 of the $18,000 payment, but this was not disclosed to the payee, or apparently to the Court of Claims.

In August, 1975, however, the Secretary of the Army revealed the dismaying truth of the matter. Barrett thereupon commenced three suits in federal court, which have been consolidated. After a bench trial of Barrett's wrongful death claim against the United States under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b) and 2671-2680 (1982), the district court held that Blauer's death was proximately caused by the negligence of the

United States in inadequately testing the fatal drug before providing it to the New York State Psychiatric Institute for human experimentation. On June 4, 1987, the Court entered judgment against the United States in the amount of $702,044.00. *See Barrett v. United States*, 660 F. Supp. 1291 (S.D.N.Y. 1987).

New York had originally been named as a defendant by Barrett, but had been dismissed from the action early in the litigation on the ground that New York was immune to direct suit by Barrett in federal court. Prior to the trial of Barrett's FTCA claim, however, the United States sought to implead New York as a third-party defendant. On June 27, 1986, the district court granted the United States leave to file the third-party complaint, which asserted claims for contribution and indemnity. After the main FTCA trial was concluded and judgment was entered against the United States, New York moved to vacate the prior order granting impleader or alternatively, to dismiss the third-party complaint on several grounds, including eleventh amendment immunity from suit in federal court.

In an opinion issued on September 8, 1987, *see Barrett v. United States*, 668 F. Supp. 339 (S.D.N.Y. 1987), the district court held that, although the United States no longer had a claim against New York for indemnity, *see Barrett v. United States*, 668 F. Supp. at 340, its claim for contribution against New York as a joint tortfeasor was not barred by the eleventh amendment. The court also rejected contentions by New York that the United States' claim for contribution was barred by a release executed by the estate of Harold Blauer as part of the 1955 settlement with New York, and that the contribution claim was precluded, as a matter of res judicata, by the Court of Claims judgment approving the 1955 settlement and a subsequent

1976 Court of Claims dismissal of Barrett's petition for pre-suit discovery pursuant to N.Y. Civ. Prac. L. & R. 3102(e) (McKinney 1970).

For the reasons hereinafter stated, we affirm the district court's decision with respect to the eleventh amendment issue, and decline to exercise pendent appellate jurisdiction with respect to the release and res judicata issues.

Discussion

A. *Eleventh Amendment Immunity.*

The eleventh amendment[1] acts as a jurisdictional bar to suits brought in federal court against a state by citizens of another state. *See, e g., Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 99 n.8 (1984) ("The limitation deprives federal courts of any jurisdiction to entertain such claims . . . ."). On the other hand, "[n]othing in the Eleventh Amendment 'has ever been seriously supposed to prevent a State's being sued by the United States.' " *Arizona v. California*, 460 U.S. 605, 614 (1983) (quoting *United States v. Mississippi*, 380 U.S 128, 140 (1965)). Federal subject matter jurisdiction in such cases may be predicated upon Article III, section 2 of the Constitution, which extends the judicial power of the United States "to Controversies to which the United States shall be a Party." U.S. Const. art. III, § 2, cl. 1; *see United States v. Texas*, 143 U.S. 621, 643 (1892).

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1 The eleventh amendment to the United States Constitution states:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another state, or by Citizens or Subjects of any Foreign State.

Despite the constitutional vesting of original jurisdiction of such suits in the Supreme Court, *see* U.S. Const. art. III, § 2, cl. 2, Congress has given original jurisdiction to the federal district courts, as well, over suits by the United States against a state in 28 U.S.C. § 1345 (1982). *See United States v. California*, 328 F.2d 729, 736-38 (9th Cir.) (legislative history, as well as plain meaning of statute, supports this result), *cert. denied*, 379 U.S. 817 (1964); *United States v. Illinois*, 454 F.2d 297, 301 (7th Cir. 1971) (following *United States v. California*), *cert. denied*, 406 U.S. 918 (1972).

It is also now recognized that the federal courts have jurisdiction to entertain third-party suits for indemnity by the United States against a state, even where the main action was commenced by a private citizen. "[T]here is no historical or other ground for believing that Congress intended to exclude third-party proceedings commenced by the United States from the broad jurisdictional power granted the district courts under Section 1345." *Williams v. United States*, 42 F.R.D. 609, 614 (S.D.N.Y. 1967). As the Seventh Circuit observed in *United States v. Illinois*, an FTCA case:

> The instant claim for indemnity is merely a claim by the United States that it has suffered a loss by reason of the negligence of Illinois. The district court, having jurisdiction over an original action by the United States for indemnity, would have jurisdiction over the identical claim brought as a third-party action. We find no sound basis for a contrary result based on the nebulous theory that the original action was "commenced" by other plaintiffs.

United States v. Illinois, 454 F.2d at 301.

Eleventh amendment challenges to jurisdiction in such actions for indemnity by the United States have been uniformly rejected, with the exception of one early case whose validity has been undermined.[2] *See Parks v. United States*, 784 F.2d 20, 23-25 (1st Cir. 1986); *United States v. Illinois*, 454 F.2d at 300-01; *Lee v. Brooks*, 315 F. Supp. 729, 732 (D. Hawaii 1970); *Williams v. United States*, 42 F.R.D. at 616.

We are aware of only two cases that have squarely addressed the issue whether a third-party action for contribution, like such an action for indemnity,[3] may be main-

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2 The first case to address this issue, *Parks v. United States*, 241 F. Supp. 297 (N.D.N.Y. 1965), held that 28 U.S.C. § 1345 (1982) and Fed. R. Civ. P. 14(a) did not provide federal jurisdiction over a third-party action for indemnification by the United States against New York where the main action, pursuant to the Federal Tort Claims Act, was commenced by a private citizen. The *Parks* case, however, was immediately subjected to criticism, *e.g.*, Recent Developments, *Federal Courts & Procedure: Eleventh Amendment as a Bar to Impleader of a State by the United States*, 65 Col L. Rev. 1506 (1965), was explicitly not followed two years later by another district court in the Second Circuit, *Williams v. United States*, 42 F.R.D. 609, 611-12 (S.D.N.Y. 1967), and has generally been regarded as "unsound," 13 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3524, at 126 n.13 (2d ed. 1984). *See United States v. Illinois*, 454 F.2d at 301 n.3 ("*Parks* appears to stand alone on this issue and has been disapproved by succeeding courts").

3 A claim for contribution differs from a claim for indemnity in several respects. A right of indemnity "arises out of a contract which may be express or may be implied in law 'to prevent a result which is regarded as unjust or unsatisfactory.' " *Rosado v. Proctor & Schwartz, Inc.*, 66 N.Y.2d 21, 24, 494 N.Y.S.2d 851, 853, 484 N.E.2d 1354, _____ (1985) (citations omitted). A claim for contribution does not arise out of an implied or express agreement, but in many states does depend upon affirmative state legislation to create a right of contribution between joint tortfeasors, since such rights were not recognized at common law. *See Putvin v. Buffalo Electric Co.*, 5 N.Y.2d

tained by the United States against a state in federal court, consistent with the eleventh amendment. In *Lee v. Brooks*, 315 F. Supp. 729 (D. Hawaii 1970), the court decided for the United States on the jurisdictional issue, and then proceeded to consider the claims of the United States both for indemnity and contribution on the merits, although deciding adversely to the United States on both claims. *Id.* at 732. More recently, the Ninth Circuit held in *United States v. Hawaii*, 832 F.2d 1116 (9th Cir. 1987), a case not cited to us by the parties, that the United States could bring a third-party claim for contribution against the State of Hawaii in an FTCA action naming the United States as defendant. *Id.* at 1117. The rationale expressed by the court, in response to Hawaii's objection to the court's jurisdiction, was:

> The United States is prosecuting its contribution claim, not the Lees' underlying claims. The eleventh amendment does not preclude it from doing so.[4]

447, 454, 186 N.Y.S.2d 15, 20, 158 N.E. 2d 691, ____ (1959); *see generally Northwest Airlines v. Transportation Workers Union*, 451 U.S. 77, 86-88 & nn. 16-19 (1981). Perhaps the main conceptual distinction is that "[c]ontribution involves an apportionment of responsibility where wrongdoers are *in pari delicto*," whereas indemnity "involves an attempt to shift the entire loss from one who is compelled to pay for a loss, without regard to his own fault, to another person who should more properly bear responsibility for that loss because he was the actual wrongdoer." *County of Westchester v. Welton Becket Assoc.*, 102 A.D.2d 34, ____, 478 N.Y.S.2d 305, 314 (2d Dep't 1984), *aff'd*, 66 N.Y.2d 642, 495 N.Y.S.2d 364, 485 N.E.2d 1029 (1985).

4 The "eleventh amendment" objection asserted by the State of Hawaii in this case was probably not based upon the literal language of that amendment, which prohibits actions against a state in federal court by "Citizens of another State, or by Citizens or Subjects of any

Id. at 1117. Unlike *Lee v. Brooks*, the United States prevailed on the merits in *United States v. Hawaii*.

We believe that *United States v. Hawaii* reaches the correct result, and adopt the rule stated therein. Whatever the distinctions between contribution and indemnity in other areas, see *supra* note 3, we see no sound basis for a distinction in this context, and do not find the authorities cited to us by New York on behalf of such a distinction persuasive.

New York places its heaviest reliance upon *Horton v. United States*, 622 F.2d 80 (4th Cir. 1980), and *Hill v. United States*, 453 F.2d 839 (6th Cir. 1972). Both of these cases, however, were decided on the basis that the relevant state substantive law, which is generally applicable in FTCA actions, *see United States v. Muniz*, 374 U.S 150, 153 (1963), did not provide a basis for recovery by the United States against the pertinent state/third-party defendant in any court.[5] In *Horton*, it was held that no

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Foreign State." U.S. Const. amend. XI. Presumably, the plaintiffs in *United States v. Hawaii* were citizens of Hawaii. Since *Hans v. Louisiana*, 134 U.S. 1 (1890), however, it has been clear that as a general rule, the federal judicial power does not extend to suits against a state by its own citizens unless the state consents thereto. *See Hans v. Louisiana*, 134 U.S. 1, 21 (1890) (Harlan, J., concurring). Although *Hans v. Louisiana* did not premise this rule on the (literally inapplicable) provisions of the Eleventh Amendment, see *id.* at 10-11, the rule is often described today as a judicial extension of the eleventh amendment. *See Parks v. United States*, 784 F.2d 20, 23 (1st Cir. 1986). Analytically, it would be preferable to consider the rule in terms of the interplay between traditional notions of sovereign immunity, the provisions of Article III, section of the federal constitution creating the federal judicial power, and the implications of state ratification of the constitution and its several amendments.

5 *United States v. Illinois*, 454 F.2d 297 (7th Cir. 1971), *cert. denied*, 406 U.S. 918 (1972), seems at odds with *Horton* and *Hill* on this point.

right of contribution existed under applicable state *or* federal law, 622 F.2d at 83, and no mention was made of the eleventh amendment. In *Hill*, the court specifically held that "the same defense would be available in an original action as under a third party complaint," 453 F.2d at 843, and also made no mention of the eleventh amendment. The court "[found] it unnecessary to pass upon the related issues which have been the subject of disagreement among at least three district courts when the United States has filed third party actions against states," *id.*, citing *Lee v. Brooks*, 315 F. Supp. 729 (D. Hawaii 1970), *Williams v. United States*, 42 F.R.D. 609 (S.D.N.Y. 1967), and *Parks v. United States*, 241 F. Supp. 297 (N.D.N.Y. 1965), all of which addressed the jurisdictional issue.

We note also *Parks v. United States*, 784 F.2d 20, 25 (1st Cir. 1986), which regarded it as an "open question" whether the eleventh amendment precluded contribution in that case and *United States v. Arizona*, 214 F.2d 389 (9th Cir.), *reh'g denied*, 216 F.2d 248 (9th Cir. 1954), which stated that if the FTCA was "intended to strip states of their immunities on suits by the United States for indemnity or contribution . . ., then we come to a serious constitutional question." *id.*, 214 F.2d at 394, but decided the case on other grounds and did not reach that question. *Parks*, however, dealt with a specific rule relating to contribution in maritime cases, 784 F.2d at 25, and was

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In *Illinois*, the Seventh Circuit, relying upon *United States v. Texas*, 143 U.S. 621, 646 (1892), allowed the United States to implead and recover indemnity from Illinois despite an unqualified sovereign immunity bar in the Illinois constitution. *United States v. Illinois*, 454 F.2d at 300-02. The issue does not arise here, for, as will be considered more fully hereinafter, New York law provides no sovereign immunity bar to the third-party claim of the United States here, although it does unavailingly attempt to limit the ability of the United States to assert that claim in a federal district court.

addressed to the impact of the eleventh amendment upon liability for contribution only in that context. *Id.* As to *United States v. Arizona*, if there is deemed to be a conflict between the two cases, *United States v. Arizona* must be considered to have been superceded, as an expression of the Ninth Circuit's views in this area, by *United States v. Hawaii*, 832 F.2d 1116 (9th Cir. 1987).

Unlike South Carolina and Tennessee, the putative third-party defendants in *Horton* and *Hill*, respectively, the state of New York has waived its immunity from suit in tort. N.Y. Ct. Cl. Act § 8 (McKinney 1963) provides in part:

> The state hereby waives its immunity from liability and action and hereby assumes liability and consents to have the same determined in accordance with the same rules of law as applied to actions in the supreme court against individuals or corporations, provided the claimant complies with the limitations of this article.

Moreover, it is undisputed that New York recognizes a right of contribution between joint tortfeasors, N.Y. Civ. Prac. L. & R. 1401-1404 (McKinney 1976), and, more specifically, a right of contribution against the state as a joint tortfeasor, *see Bay Ridge Air Rights, Inc. v. New York*, 44 N.Y.2d 49, 404 N.Y.S.2d 73, 375 N.E.2d 29 (1978).

It is clear, however, that a state may ordinarily waive its immunity from liability without waiving its power to choose the court or jurisdiction in which it allows itself to be sued. "A State's constitutional interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued." *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984) (emphasis in original) (footnote omitted). It is precisely the latter interest that the

eleventh amendment protects even when a state has expressly waived its common law sovereign immunity. *Id.* at 99 n.9 ("a State's waiver of sovereign immunity in its own courts is not a waiver of the Eleventh Amendment immunity in the federal courts") (citing *Florida Dep't of Health and Rehabilitative Services v. Florida Nursing Home Ass'n*, 450 U.S. 147, 150 (1981) (per curiam)).

For example, in *Minotti v. Lensink*, 798 F.2d 607 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 2484 (1987), we recently held that although a Connecticut statute had unmistakably waived sovereign immunity in certain specified civil actions, the language of the statute did not "explicitly . . . waive immunity to suit in federal court," *id.* at 611; dismissal for want of federal jurisdiction was accordingly directed. *Id.; see Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985) ("[I]n order for a state statute or constitutional provision to constitute a waiver of Eleventh Amendment immunity, it must specify the state's intention to subject itself to suit in *federal court*") (emphasis in original).

Even though New York has waived its immunity from liability, the state has made clear its intent to allow suit against it only in the New York Court of Claims. N.Y. Ct. Cl. Act § 8 (McKinney 1963); *Psaty v. Duryea*, 306 N.Y. 413, 118 N.E.2d 584 (1954). It is also clear under New York law that an action for contribution against the state as a joint tortfeasor may only be maintained in the New York Court of Claims. *Bay Ridge Air Rights, Inc. v. New York*, 44 N.Y.2d 49, 54, 404 N.Y.S.2d 73, 75, 375 N.E.2d 29, ____ (1978). Nevertheless, we hold that where New York has waived sovereign immunity from liability for contribution, thus providing the United States with a valid claim under state law, neither the eleventh amendment nor

any state law bars federal jurisdiction with respect to such a claim by the United States.

We so rule because jurisdiction over suits in which the United States is a party, which is vested in the courts of the United States by Article III, section 2, clause 1 of the United States Constitution, and in the federal district courts by 28 U.S.C. § 1345 (1982), cannot be defeated by such a state legislative or constitutional provision. "The federal government, of course may sue a state in federal court *under any valid cause of action, state or federal*, even if the state attempts to limit the cause of action to suits in state courts only." *United States v. California*, 655 F.2d 914, 918 (9th Cir. 1980) (emphasis added) (citing *United States v. Nevada Tax Comm'n*, 439 F.2d 435 (9th Cir. 1971); *see United States v. Hawaii*, 832 F.2d 1116, 1117 (9th Cir. 1987) (finding federal jurisdiction over contribution claim by United States against Hawaii under 28 U.S.C. § 1345 (1982) "even though Hawaii law provides that the suit must be heard in a Hawaii state court").

Nor is the constitutional analysis altered because this is a third-party action in an FTCA case. New York argues that by enacting the FTCA, the United States has shed the cloak of sovereignty and has consented to be treated in all respects like any private individual who would be barred by the eleventh amendment from suing or impleading New York in federal court. Under the FTCA, "[t]he United States shall be liable, respecting the provisions of this title relating to tort claims, *in the same manner and to the same extent as a private individual* under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages." 28 U.S.C. § 2674 (1982) (emphasis added). *See also* 28 U.S.C. § 1346(b) (1982).

The "private individual" language of the FTCA refers, however, to the United States' liability as a defendant, not to its rights as a plaintiff or third-party plaintiff. New York overlooks the fact, moreover, that even as a defendant, in addition to the exceptions stated in section 2674 as to prejudgment interest and punitive damages, the United States has not consented to be treated as a private individual in one very important respect: it has consented to be sued only in federal court. *See* 28 U.S.C. § 1346(b) (1982) (specifying "exclusive jurisdiction" over FTCA cases in federal district courts).

In view of these clear exceptions to the "private individual" status of the United States under the FTCA, and the silence of the statute with respect to the very substantial modification New York would have us imply as to the normal standing of the United States as a litigant, we do not read the FTCA as limiting or abrogating either the power of the United States that is implicit in our federal system to maintain, or the jurisdiction of the federal courts that is vested by Article III of the federal Constitution to hear and decide, an action against a state in federal court.

We therefore hold that the United States' claim for contribution against New York in federal court is not barred by the eleventh amendment.

B. *Pendent Issues.*

New York also contends that the district court erred in not giving effect to New York's res judicata and release defenses. These defenses are predicated upon a 1955 settlement entered into between Blauer's estate and New York, in the course of which Blauer's estate provided a general release to New York upon which the release defense is premised, and the New York Court of Claims entered a

judgment approving the settlement upon which the res judicata defense is primarily premised.[6] *See Barrett v. United States*, 668 F. Supp. at 340-42.

These issues, however, are intertwined with unresolved factual issues concerning the validity of the 1955 release and the alleged fraudulent procurement of the settlement agreement. *Id.* We have already observed, with respect to this litigation, that one of the central issues is the alleged concealment, by state and federal agents, of federal involvement in the testing program at the time of the 1955 settlement. *See Barrett v. United States*, 798 F.2d 565, 578 (2d Cir. 1986) (apparent that settlement would have been "much higher" but for the alleged conspiracy between state and federal officials to conceal federal involvement from plaintiff). Furthermore, these issues are sharply distinct from the eleventh amendment issue upon which our appellate jurisdiction herein is premised.

We therefore decline to exercise pendent jurisdiction with respect to these issues, and confine our review to the issue of eleventh amendment immunity over which we have jurisdiction under the collateral order doctrine. *Cf. United States v. Ianniello*, 824 F.2d 203, 209 (2d Cir. 1987) (appellate court may in its discretion consider otherwise nonappealable issues where they are sufficiently intertwined with appealable issue to justify addressing them simultaneously).

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6 It is also contended that the 1976 Court of Claims dismissal of Barrett's petition for pre-suit discovery has a res judicata impact here. The district court summarily, and in our view correctly, rejected this assertion. *See Barrett v. United States*, 668 F. Supp. at 342.

Conclusion

The judgment of the district court denying New York's motion to dismiss the third-party complaint on eleventh amendment grounds is affirmed; the exercise of pendent appellate jurisdiction with respect to the release and res judicata issues is declined.

APPENDIX B

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ELIZABETH BARRETT, as Administratrix of the Estate of HAROLD BLAUER, Deceased,	:	
Plaintiff,	:	
– against –	:	
UNITED STATES OF AMERICA,	:	
Defendant.	:	
	:	76 Civ. 381 (CBM)
UNITED STATES OF AMERICA,	:	
Third-Party Plaintiff,	:	
– against –	:	
STATE OF NEW YORK,	:	
Third-Party Defendant.	:	

ORDER

The motion of New York State to dismiss the third-party complaint of third-party plaintiff United States of America is denied. Opinion to follow.

SO ORDERED

Dated: New York, New York
July 1, 1987

/s/Constance Baker Motley
CONSTANCE BAKER MOTLEY
U.S.D.J.

APPENDIX C

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

— x

ELIZABETH BARRETT, as Administratrix of the Estate of HAROLD BLAUER, Deceased,

Plaintiff,

— against —

UNITED STATES OF AMERICA,

Defendant.

— x 76 Civ. 1061 (CBM)

UNITED STATES OF AMERICA,

Third-Party Plaintiff,

— against —

STATE OF NEW YORK,

Third-Party Defendant.

— x

APPEARANCES:

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MOTLEY, J.

OPINION

On June 27, 1986, this court granted the United States leave to file a third-party complaint against the State of New York (the State) in the case of *Barrett* v. *United States*. The complaint asserted claims for contribution and indemnity. Because this court has since determined that the United States is not liable for any negligence on the part of the State, *See Barrett* v. *United States*, 660 F. Supp. 1291, 1315 (S.D.N.Y. 1987), the United States no longer has any claim for indemnity against the State. The United States does, however, continue to press its claim for contribution.

The State now moves this court to vacate the June 27 order. It argues that the court should not have granted the order because the United States delayed excessively in filing the third-party complaint. The court rejected this argument when it issued the order in question, and the State makes no new arguments that persuade the court that its decision was incorrect.

In the alternative, the State asks the court to dismiss the third-party complaint, pursuant to Fed. R. Civ. P. 12(b)(1) and (6). It argues: 1) that the release executed by Amy Blauer in 1955 bars any action for contribution against the State, 2) that the judgments issued in 1955 and 1976 by the New York Court of Claims preclude the United States' claim, 3) that the United States fails to state a claim, and 4) that the Eleventh Amendment to the United States Constitution bars the United States' claim. For the reasons that follow, the court finds these arguments without merit.

1. The Release

As a defense to the United States' claim for contribution, the State points to a release it obtained from Amy Blauer in 1955. *See Barrett*, 660 F. Supp. at 1300-06 (describing the circumstances surrounding the execution of the release). It says that New York law in effect in 1955 required tortfeasors to be subject

to a joint judgment before a right of contribution could exist. *See Brown* v. *Cranston*, 132 F.2d 631, 633 (2d Cir. 1942), *cert. denied sub nom. Cranston* v. *Thompson*, 319 U.S. 741 (1943); *Fox* v. *Western New York Motor Lines, Inc.*, 257 N.Y. 305, 308, 178 N.E. 289, 289-90 (1931). The rule implied that a defendant who had been released from liability to the injured party could not be required to contribute to payment of any judgment obtained by that plaintiff against another tortfeasor. *See Franzek* v. *Calspan Corp.*, 78 A.D.2d 134, 139, 434 N.Y.S.2d 288, 291 (4th Dep't 1980). The State says that under this law the release bars the United States' claim.

The United States responds to this argument by questioning the validity of the release. New York admits that if the lease is invalid, then the United States' right to contribution is governed by New York General Obligations Law § 15-108, which entitles a defendant to sue for contribution on the basis of an equitable apportionment of the wrong. The State claims, however, that the United States has no standing to challenge the validity of the release.

The rule barring actions for contribution against a joint tortfeasor who has obtained a release rests upon the assumption that the parties to the release negotiated in good faith. When this assumption fails, enforcement of the rule may no longer be appropriate. Courts may therefore permit joint tortfeasors seeking contribution to question the good faith of the parties to the release by, for example, alleging collusion between the releasor and the releasee. *See Franzek*, 78 A.D.2d at 141, 434 N.Y.S.2d at 292. The court sees no reason why other sorts of bad faith ought not similarly to provide grounds for challenge of a release by a third party whose rights to contribution are in jeopardy. *Cf. Gregory* v. *Garrett Corp.*, 578 F. Supp. 890, 893 n.7 (S.D.N.Y. 1984) ("[T]he Court is not persuaded that [collusion] is the only way to establish bad faith."). It would surely be inconsistent with the purpose of the rule-- to promote fair settlements -- to extend the rule's protection to a tortfeasor who defrauds an injured party in obtaining a release. The court therefore concludes that where, as here, a third party alleges that a release was procured by fraud, the releasee should not be permitted to rely upon

the release as a bar to an action for contribution. When good faith is in doubt, the validity of the release becomes a question of fact to be determined at trial. *Cf. Barrett* v. *United States*, 622 F. Supp. 574, 585 (S.D.N.Y. 1985) (holding that an issue of fact existed as to whether the release issued by Amy Blauer was procured by fraud).

2. Res. Judicata

The State argues that the doctrine of *res judicata* bars the United States' third-party action for contribution. The State points out that in 1955, the New York Court of Claims entered judgment for Amy Blauer in her wrongful death action against the State of New York. Also, in 1976, the Court of Claims dismissed Elizabeth Barrett's C.P.L.R. § 3102 petition for pre-suit discovery, holding that she stated no new cause of action against the State merely by alleging that the United States had supplied the drug that killed her father. The judgments do not bar the United States' claim, however, because

> [f]or a judgment in a prior action to be a bar to reaching the merits in a subsequent action it is firmly established that the prior judgment must have been rendered by a court of competent jurisdiction, been a final judgment on the merits, and that the same cause of action and the same parties or their privies were involved in both suits.

Herendeen v. *Champion Int'l Corp.*, 525 F.2d 130, 133 (2d Cir. 1975). If the release turns out to have been procured by fraud, then the judgment issued in 1955 is more appropriately viewed as a means of implementing a fraudulent settlement than as a decision on the merits. Until the question of fraud is resolved, the 1955 judgment cannot serve to bar the United States' claim. The court has noted before that the 1976 decision was not a judgment on the merits. *See Barrett*, 660 F. Supp. at 1312 (S.D.N.Y. 1987) (citing *In re Teltronics Serv., Inc.*, 762 F.2d 185, 190 (2d Cir. 1985)). Moreover, even if the Court of Claims had decided both cases on the merits, the United States' action cannot be barred by the judgments because it was not a party to either case.

3. Failure to State a Claim

The State argues that the United States fails to state a claim because the third-party action is derivative of Elizabeth Barrett's, and she cannot maintain an action against the State. But New York law permits a third-party plaintiff to file a complaint for contribution even if the primary plaintiff cannot maintain a direct suit against the third-party defendant. *See Klinger* v. *Dudley*, 41 N.Y.2d 362, 368, 393 N.Y.S.2d 323, 328 (1977); *Figueroa* v. *Kahn*, 101 Misc.2d 821, 822, 422 N.Y.S.2d 274, 275 (S. Ct. 1979). The cases that the State cites to the contrary are clearly distinguishable from the present one. The New York Court of Appeals barred contribution in *Holodook* v. *Spencer*, 36 N.Y.2d 35, 364 N.Y.S.2d 859 (1974) because the alleged underlying tort was not cognizable as a matter of law. It barred contribution in *Barry* v. *Niagara Frontier Transit System, Inc.*, 35 N.Y.2d 629, 364 N.Y.S.2d 823 324 N.E.2d 312 (1974) because it determined that the third-party defendant had not violated any duty of care to the primary plaintiff. Neither of these grounds applies in this case. In *Lee* v. *Brooks*, 315 F. Supp. 729, 732 (D. Hawaii 1970), the court disallowed a claim for contribution because state law would not have permitted the primary plaintiff, a state employee, to sue the state in tort for injuries incurred while on the job. Claims for contribution failed in *Horton* v. *United States*, 622 F.2d 80, 83 (4th Cir. 1980); *Hill* v. *United States*, 453 F.2d 839, 842 (6th Cir. 1972) because the states in question had not waived their immunity from suit. But, under the circumstances of the present case, New York law permits tort suits -- as well as suits for contribution -- against the state. *See Gates-Chili Central School District* v. *State*, 55 A.D.2d 44, 389 N.Y.S.2d 716 (4th Dep't 1976). The court, therefore, concludes that the United States states a claim for contribution against the State.

4. The Eleventh Amendment

The Eleventh Amendment says: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United

States by Citizens of another State, or by Citizens or Subjects of any Foreign States." The State concedes that the amendment does not "as a general rule" apply to actions by the United States against a state. It argues, however, that this court should recognize an exception to the general rule when the United States brings a third-party action to insulate itself from liability under the Federal Tort Claims Act (the Act), 28 U.S.C. §§ 1346 *et seq* (1982). The State says that the Act requires that the United States be treated as if it were a private party -- even for the purpose of applying the Eleventh Amendment. But the cases the State cites as authority for this proposition do not even mention the Eleventh Amendment. They merely discuss certain similarities between the treatment of the United States and the treatment of private parties when the United States is a *defendant* in a claim pursuant to the Act. *See United States* v. *Yellow Cab Co.*, 340 U.S. 543, 552 (1951) (reasoning that the United States should be susceptible to suit for contribution in the same courts as private parties); *Lambertson* v. *United States*, 528 F.2d 441, 444 (2d Cir.), *cert. denied*, 426 U.S. 921 (1976) ("[I]f the state would look to a state or federal statute in determining the liability of a private party for the tort in question, the same statute will be applied in measuring the conduct of the Government . . . .") This court, therefore, agrees with the majority of courts that have held that the Eleventh Amendment does not bar the United States from impleading a state. *See Parks* v. *United States*, 784 F.2d 20, 24 (5th Cir. 1986); *United States* v. *Illinois*, 454 F.2d 297 (7th Cir. 1971); *United States* v. *California*, 329 F.2d 729 (9th Cir.), *cert. denied*, 379 U.S. 817 (1964); *Andrulonis* v. *United States*, 96 F.R.D. 43 (N.D.N.Y. 1982); *Williams* v. *United States*, 42 F.R.D. 609 (S.D.N.Y. 1967).

None of the arguments proffered by the State show that this action should not proceed to trial. The State's motion to vacate the court's order of June 27, 1986 or in the alternative to dismiss the third-party complaint against it is therefore denied.

Dated: New York, New York

September 8, 1987 -

/s/Constance Baker Motley
Constance Baker Motley
U.S.D.J.

APPENDIX D

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the second day of August one thousand nine hundred and eighty eight.

Present:

HON. WILLIAM H. TIMBERS

HON. AMALYA L. KEARSE

HON. J. DANIEL MAHONEY

Circuit Judges,

ELIZABETH BARRETT, individually and as administratrix of the Estate of Harold Blauer, deceased,

Plaintiff,

—v—

UNITED STATES OF AMERICA,

Defendant,

Docket No. 87-6189

UNITED STATES OF AMERICA,

Third-Party Plaintiff-Appellee,

—v—

STATE OF NEW YORK,

Third-Party Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of the district court denying New York's motion to dismiss the third-party complaint on eleventh amendment grounds is affirmed; the exercise of pendent appellate jurisdiction with respect to the release and res judicata issues is declined in accordance with the opinion of this court.

ELAINE B. GOLDSMITH, Clerk

s/Edward J. Guardaro
Edward J. Guardaro, Deputy Clerk

A TRUE COPY
ELAINE B. GOLDSMITH, Clerk

By Fredric Cassidy
Chief Deputy Clerk

ISSUED AS MANDATE:
September 6, 1988